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ALEXANDER L. STEVAS,
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NO. 82-6560

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

BILLY JOE MAGWOOD,

Petitioner

v.

STATE OF ALABAMA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI

TO THE ALABAMA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should this Court use its certiorari powers to review whether a state trial court properly applied settled law concerning pre-trial publicity to a particular set of facts?

2. Should this Court use its certiorari powers to review a sufficiency of the evidence issue involving insanity?

3. Does a criminal defendant examined by state paid psychiatrists have the right to be examined by an additional psychiatrist of his own choosing to be paid out of state funds?

4. Was the curative judicial construction performed on Alabama's 1975 capital punishment statute by the Alabama Supreme Court in Beck v. State, 396 So. 2d 645 (Ala. 1980), as a result of Beck v. Alabama, 447 U.S. 645 (1980), unconstitutional?

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OPINIONS BELOW

1. The opinion of the Alabama Court of Criminal Appeals affirming petitioner's conviction and death sentence is published as Magwood v. State, 426 So. 2d 918 (Ala. Cr. App. 1982).

2. The opinion of the Alabama Supreme Court affirming the Court of Criminal Appeals decision is published as Ex parte Magwood, 426 So. 2d 929 (Ala. 1983).

JURISDICTION

The decision of the Alabama Supreme Court that petitioner seeks to have this Court review was entered on January 7, 1983. A timely application for rehearing was denied on February 11, 1983. The petition was timely filed on April 12, 1983.

This Court has jurisdiction pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The petition addresses issues involving the Eighth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

This case stems from the fact that, "[o]n March 1, 1979, Billy Joe Magwood, the petitioner, shot and killed Coffee County Sheriff Neil Grantham." Ex parte Magwood, 426 So. 2d 929, 930 (Ala. 1983). Petitioner was indicted, tried, convicted, and sentenced to death in the Circuit Court of Coffee County, Alabama for the Code of Alabama 1975, §13-11-2(a)(5) capital offense of murdering a law enforcement officer on duty or because of some official or job-related act or performance of the officer. Magwood v. State, 426 So. 2d 918 (Ala. Cr. App. 1982); Ex parte Magwood, 426 So. 2d 929 (Ala. 1983).

The procedures used at petitioner's 1981 trial and sentence hearing were those promulgated by the Alabama Supreme Court in Beck v. State, 396 So. 2d 645 (Ala. 1980).

The testimony presented at trial is summarized and the legal proceedings more particularly detailed in Magwood v. State, 426 So. 2d at 920-921, and Ex parte Magwood, 426 So. 2d at 930-931.

ARGUMENT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

The petition for a writ of certiorari should be denied because the Alabama appellate courts correctly applied this Court's applicable decisions to each of the four issues raised in the petition. The first two issues involve abuse of discretion arguments peculiar to the facts of this case which are not of sufficient importance to merit certiorari review by this Court. The third and fourth issues are of wider significance but were correctly decided below.

I. THE PRE-TRIAL PUBLICITY QUESTION WAS PROPERLY DECIDED AND PRESENTS NO ISSUE WORTHY OF REVIEW BY CERTIORARI

The first question addressed in the petition concerns the pre-trial publicity issue. Pet. at 6-7. The Alabama Court of Criminal Appeals discussed that question in the following part of its opinion:

> Appellant asserts the trial court abused its discretion in refusing to grant his motion for a change of venue, based upon prejudicial pre-trial publicity. The record indicates a large amount of coverage was given to the sensational and notorious crime by television, radio, and the printed news media. However, the vast majority of the news accounts were strictly factual in nature and did not editorialize in such a manner as to inflame the community. Coon v. State, 380 So.2d 980 (Ala.Cr.App.1979), affirmed, 380 So.2d 990 (Ala.1980). Additionally, much of the coverage occurred at the time of the murder, or in the months immediately following the event, with relatively little coverage occurring at the time of the trial over two years later.
>
> The existence of widespread publicity in and of itself does not require a change of venue. Dolvin v. State, 391 So.2d 666 (Ala.Cr.App.1979), affirmed, 391 So.2d 677 (Ala.1980); Speigner v. State, 367 So.2d 590 (Ala.Cr.App.), cert.

denied, 367 So.2d 597 (Ala.1979). Without proof of actual prejudicial influence upon the jury, a trial court will not be found to have abused its discretion in refusing to grant a motion for a change of venue based upon pre-trial publicity. Dolvin, supra. We have reviewed the record carefully, scrutinizing both the media coverage itself, and its effect upon the jury venire as revealed by the voir dire examination of the prospective jurors. We note that any potential prejudicial effect of media coverage was diminished by the passage of time. Speigner, supra. The record contains no showing of actual prejudice such as would have rendered it reasonably unlikely that the appellant could secure a fair and impartial trial. Dolvin, supra. ...

Magwood v. State, 426 So. 2d 918, 923 (Ala. Cr. App. 1982).

The Court then quoted a representative sample of jury voir dire questions and answers, id., at 924, and concluded:

> Of the entire venire, one juror answered that he had a fixed opinion as to appellant's guilt or innocence. This juror was an employee of the Coffee County Sheriff's Department which had been involved in the investigation of the Sheriff's assassination, and he was excused from serving. None of the questions of appellant's counsel concerning prejudice as a result of publicity were answered in the affirmative. Two jurors expressed an opinion of possible partiality, but stated it was based upon their long-time friendship with Sheriff Grantham, not pre-trial publicity. Both jurors were excused. The burden is upon appellant to demonstrate the actual existence of a prejudicial opinion in the mind of the jurors which will raise a presumption of partiality. Speigner, supra. The introduction of news articles alone, without more, is not sufficient evidence to justify a change of venue; their prejudicial effect must be shown. Dolvin, supra at 674; Dial v. State, 387 So.2d 871 (Ala. Cr.App.1979), reversed on other grounds, 387 So.2d 879 (Ala.1980).
>
> The appellant in the instant case presented no evidence that the jurors were actually prejudiced against the appellant's case as a result of extensive publicity. Without such proof, this court could not find error in the trial court's refusal to grant a motion for change of venue. Dolvin, supra; Moberg v. State, 385 So.2d 74 (Ala.Cr.App.1980); Coon, supra.

Id., at 924-925.

The Alabama Supreme Court addressed the question in a similar fashion:

> The petitioner raises several points of error for our consideration. First, petitioner asserts that it was error for the trial court to deny his motion for change of venue based on prejudicial pre-trial publicity.
>
> Absent a showing of abuse of discretion, the ruling of the trial court on a motion for change of venue will not be disturbed. Speigner v. State, 367 So.2d 590 (Ala.Cr.App.1978), cert. denied, 367 So.2d 597 (Ala.1979). The defendant has the burden of showing that he will be unable to receive an impartial trial and an unbiased verdict at the present locale. Speigner, supra.
>
> Absent a showing of actual prejudicial influence upon the jury, the trial court was not in error in refusing to grant a motion for change of venue. Dolvin v. State, 391 So.2d 666 (Ala.Cr.App.1979), aff'd, 391 So.2d 677 (Ala.1980). The petitioner rests his assertion of bias on his impressions of public feeling at the time of the trial. Petitioner states in his brief, "Defendant's proof of such prejudicial influence was only displayed by the jury's verdict regarding his sanity." (Emphasis added.) Petitioner appears to contend that because the jurors found him to be sane they must have been prejudiced against him. This circuitous reasoning does not constitute a showing of actual prejudice as required by the case law.
>
> Our review of the voir dire examination of the jurors reveals no indication of possible bias. We agree with the Court of Criminal Appeals that the publicity surrounding the crime was strictly factual in nature and was not designed to inflame the community. Further, the trial took place two years after the crime. Even if we considered the publicity prejudicial, clearly the passage of time would diminish any prejudicial effect of the media coverage. See, Speigner, supra. Thus, the Court of Criminal Appeals did not err in holding that the denial of petitioner's motion for change of venue was not in error.

Ex parte Magwood, 426 So. 2d 929, 931 (Ala. 1983).

The rules of decision applied to this question by the Alabama appellate courts are entirely consistent with this Court's decisions holding that the constitutional test is

whether a juror can put aside any impressions based on pretrial publicity and render a fair verdict based on the evidence. E.g., Dobbert v. Florida, 432 U.S. 282, 303 (1977); Murphy v. Florida, 421 U.S. 794, 800 (1975); Irvin v. Dowd, 366 U.S. 717, 722-723 (1961). It is also well-established that the burden is on the defendant to show that one or more members of the jury panel could not do so. E.g., United States v. Garza, 664 F. 2d 135, 138 (7th Cir. 1981), cert. denied, 102 S. Ct. 1620 (1982); United States v. Provenzano, 620 F. 2d 985, 995 (3rd Cir. 1980).

Petitioner does not dispute the fact that the Alabama courts enunciated the correct principles of law. Instead, he simply contends that those controlling principles were applied in this particular case in a manner constituting an abuse of discretion. That does not state a substantial basis for grant of certiorari, because this Court does not sit to review the application of law to facts by the state courts.

II. THE QUESTION CONCERNING THE SUFFICIENCY OF THE EVIDENCE ON THE INSANITY ISSUE WAS PROPERLY DECIDED AND PRESENTS NO ISSUE WORTHY OF REVIEW BY CERTIORARI

On pp. 7 - 11 of his petition, the petitioner asks this Court to hold that the trial court abused its discretion in submitting the issue of petitioner's sanity to the jury. He made the same request of the Alabama Court of Criminal Appeals, which summarized the applicable law as follows:

> Appellant argues the jury's verdict was contrary to the law and the evidence presented, in that the jury should have returned a verdict of not guilty by reason of insanity.
>
> In reviewing the question of insanity, the court must apply the following general principles, enumerated in Herbert v. State, 357 So.2d 683 (Ala.Cr.App.), cert. denied, 357 So.2d 690 (Ala.1978):

"1. By statute, there is a presumption of sanity extending to all persons over the age of 14.

"2. The defense of insanity is an affirmative defense. The burden of proving this defense rests upon the defendant and never shifts to the state.

"3. The burden upon the defendant is to establish the issue of legal insanity by a preponderance of the evidence and to the reasonable satisfaction of the jury.

"4. The question of insanity at the time of the commission of the crime is a matter to be determined by the jury from a consideration of all the evidence.

"5. In making its determination, the jury may reject all expert testimony though it is without conflict.

"6. However, opinion testimony, even of experts must be weighed by the jury and may not be arbitrarily ignored."

However, where proof of insanity is both overwhelming and uncontradicted, the evidence of insanity may be so strong and undisputed that the jury should be so instructed, and a jury verdict to the contrary must be reversed. Christian v. State, 351 So.2d 623 (Ala.1977).

Magwood v. State, 426 So. 2d 918, 921-922 (Ala. Cr. App. 1982). The appeals court then carefully reviewed the conflicting psychiatric testimony presented by the two sides in this case, id., at 922-923, and concluded:

After consideration of all the testimony in this case, we do not find that the evidence of insanity was both overwhelming and uncontradicted. There was evidence presented which could have supported a reasonable inference that the homicide was an act committed by a man which the law would define as sane. Although conflicting evidence was presented by the expert witnesses who examined appellant, it is clear that the issue of whether appellant was sane or insane at the time of the offense was a question for the jury to decide. Nobis v. State, 401 So.2d 191 (Ala.Cr.App.), 401 So.2d 204 (Ala.1981). The evidence was simply not sufficient as a matter of law to overcome the presumption of sanity and to justify reversing the jury's verdict. Graham v. State, 383 So.2d 892 (Ala.Cr. App.), cert. denied, 383 So.2d 895 (Ala. 1980).

Id., at 923.

The Alabama Supreme Court reached the same conclusion in the matter:

> The second point of error raised by petitioner is that the lower court erred in submitting the case to the jury in light of the "overwhelming and uncontradicted" evidence introduced by defendant to rebut the presumption of sanity. This issue was addressed by this Court in Christian v. State, 351 So.2d 623 (Ala. 1977), wherein the Court established guidelines on the insanity defense. The Court reaffirmed the principle that the defendant is presumed sane and that the defendant has the burden of proof on the issue of insanity. The defendant must establish insanity by a preponderance of the evidence and the question is to be determined by the jury, except in cases where the evidence is "overwhelming and uncontradicted." Christian v. State, 351 So.2d at 624. See also, Lee v. State, 246 Ala. 343, 20 So.2d 471 (1945).
>
> In the case before us, the question of insanity was submitted to the jury, based upon conflicting testimony given by a series of four expert witnesses. Dr. Crook and Dr. Cooper, both practicing physicians, testified for the State that at the time of their examinations of the defendant in June of 1979 he was sane. Dr. Doug McKeown, a clinical psychologist who examined the petitioner in April of 1981, testified that in his opinion the defendant knew the difference between right and wrong on the day Sheriff Grantham was killed. Finally, the deposition of Dr. Rudder, a psychiatrist, was read at trial. In Dr. Rudder's opinion, Magwood was insane at the time of the killing.
>
> We cannot say that the evidence in this case was overwhelming and uncontradicted on the issue of petitioner's claim of insanity. The trial court was not in error in submitting the question to the jury.

Ex parte Magwood, 426 So. 2d 929, 931 (Ala. 1982).

The conclusion of the Alabama appellate courts on this question is correct. Extrapolating from Jackson v. Virginia, 443 U.S. 307 (1979), it simply cannot be said that no rational trier of fact could have found that petitioner failed to prove he was insane at the time of the crime, especially since three of the four expert witnesses who

testified on the subject testified that petitioner was sane at that time. More fundamentally, this Court's scarce certiorari resources should not be squandered in making the kind of abuse-of-discretion review that petitioner requests.

III. THE QUESTION CONCERNING DENIAL OF PETITIONER'S REQUEST TO HIRE AN ADDITIONAL PSYCHIATRIST OF HIS OWN CHOOSING WAS PROPERLY DECIDED AND PRESENTS NO SIGNIFICANT ISSUE

The third contention that petitioner raises is that the trial court abused its dicretion in failing to permit him to select a psychiatrist of his own choosing to be paid for by the state. Pet. at 11-14. The Alabama Court of Criminal Appeals addressed and rejected that contention for the following reasons:

> The trial court's failure to grant appellant's request for funds to hire a psychiatrist or psychologist of his own choosing is urged by appellant as reversible error. We do not agree. As has often been stated, a denial of funds to pay experts for investigations and the assistance of experts does not amount to a deprivation of constitutional rights. Thigpen v. State, 371 So.2d 385 (Ala.Cr. App.), cert. denied, 372 So.2d 387 (Ala. 1979); Brown v. State, 392 So.2d 1248 (Ala.Cr.App.1980), cert. denied, 392 So. 2d 1266 (Ala.1981); Johnson v. State, 335 So.2d 663 (Ala.Cr.App.), cert. denied, 335 So.2d 678 (Ala.1976), cert. denied, 429 U.S. 1026, 97 S.Ct. 649, 50 L.Ed.2d 629 (1976). This general rule applies equally to psychiatric experts and specialists. Nelson v. State, 405 So.2d 392 (Ala.Cr.App.1980), reversed on other grounds, 405 So.2d 401 (Ala.1981). Additionally, as indicated heretofore in this opinion, the trial court exhausted all available sources to assist appellant in presenting evidence in support of his insanity plea. Not one, but six experts examined appellant at the State's expense. Clark v. State, 56 Ala.App. 67, 318 So.2d 813 (1974), writ quashed, 294 Ala. 493, 318 So.2d 822 (1975), cert. denied, 423 U.S. 937, 96 S.Ct. 298, 46 L.Ed.2d 270 (1975). Three experts were independent, and three were State connected. Although a defendant may have some right to the appointment of an expert for preparation of his defense, there exists no constitutional right to

> have a private psychiatrist of the defendant's own choosing appointed at public expense. Willie Clisby, Jr. v. State, ___ So.2d ___ (Ala.Cr.App.1982), 6 Div. 576 [Ms. May 2, 1982]. The trial judge's actions appropriate protected appellant's rights in this regard.

Magwood v. State, 426 So. 2d 918, 925 (Ala. Cr. App. 1982) (emphasis added and deleted). The Alabama Supreme Court agreed. Ex parte Magwood, 426 So. 2d 929, 932 (1983).

An indigent criminal defendant is not entitled to appointment of a private psychiatrist of his own choosing to be paid out of state funds. E.g., Satterfield v. Zahradnick, 572 F. 2d 443, 445 (4th Cir.), cert. denied, 436 U.S. 920 (1978); Wilkins v. Maryland, 402 F. Supp. 76, 80-81 (D. Md. 1975), aff'd, 538 F. 2d 327 (4th Cir. 1976); Utsler v. Erickson, 315 F. Supp. 480, 482-483 (D. S.D. 1970), aff'd, 440 F. 2d 140 (8th Cir.), cert. denied, 404 U.S. 956 (1971); McGarty v. O'Brien, 188 F. 2d 151 (1st Cir. 1951), cert. denied, 341 U.S. 928 (1951). Unless this Court is willing to hold to the contrary, or is willing to hold that a criminal defendant is entitled to have more than six experts examine him, certiorari should not be granted on this question.

IV. THE QUESTION CONCERNING THE CONSTITUTIONAL PROPRIETY OF THE ALABAMA SUPREME COURT'S DECISON IN BECK v. STATE, 396 So. 2d 645 (Ala. 1980) (on remand), WAS CORRECTLY DECIDED BELOW

In Beck v. Alabama, 447 U.S. 625 (1980), this Court held that the preclusion clause contained in Alabama's 1975 capital punishment statute, Code of Alabama 1975, §13-11-2(a), could not constitutionally be applied in a death sentence case to prevent instructing a jury on a lesser included non-capital offense which was supported by the

evidence.[1] On remand, after briefing and oral argument, the Alabama Supreme Court issued an opinion severing the preclusion clause from the statute and promulgating new procedures to be used in future trials and retrials under the 1975 statute. Beck v. State, 396 So. 2d 645 (Ala. 1980). Petitioner's crime occurred before the decision in Beck v. State, supra, and he was tried afterwards in compliance with the procedures announced in that decision.

The petition raises the issue of whether petitioner's trial under the Beck v. State, supra, procedures violated his constitutional rights, particularly those arising under the Separation of Powers Clause. Pet. at 14. The issue was decided adversely to him below. Magwood v. State, 426 So. 2d 918, 928 (Ala. Cr. App. 1982).[2] The issue is squarely presented in this case, and it is not an insignificant one in terms of the number of cases affected. While no exact figures are available, there are approximately a dozen cases in which Alabama defendants committed capital murder before the December 19, 1980 date of the Alabama Supreme Court's decision in Beck v. State, supra, and were tried and sentenced to death afterwards under the procedures specified in that decision. The position of the State of Alabama is simply that the matter was correctly decided below.

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[1]Petitioner asserts that in Beck v. Alabama, supra, this Court found the 1975 statute "to be patently unconstitutional as a whole." Pet. at 14. The falsity of that assertion is established by Hopper v. Evans, 102 S. Ct. 2049 (1982), which upheld a pre-Beck capital conviction in a death sentence case, and by Alabama v. Evans, No. A-858 (U.S. April 22, 1983) (per curiam), which vacated a lower court stay and permitted the defendant in that same pre-Beck case to be executed.

[2]Petitioner did not raise the issue in his certiorari petition and brief to the Alabama Supreme Court, and consequently that court did not address it. See, Ex parte Magwood, 426 So. 2d 9292 (Ala. 1983). However, petitioner did belatedly raise that issue in the application for rehearing he filed in the Alabama Supreme Court, which was denied without opinion.

The Alabama Supreme Court recognized and addressed the separation of powers issue in the Beck v. State, supra, opinion itself:

> Under the separation of powers doctrine, this Court cannot change the offense, but a change in procedure to comport with constitutional requirements is not impermissible. In Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977), the Supreme Court of the United States rejected an argument that a procedural change in the method of sentencing to conform to Furman requirements was ex-post facto. The legislature has adopted the sentencing scheme and has required jury participation. What we do is to adopt a rule whereby that scheme will comport with constitutional requirements.

396 So. 2d at 662 (majority opinion). Mr. Justice Adams, concurring specially, agreed:

> The key issue of the case, of course, is whether our Court can make these changes in Alabama's death penalty statute and escape the objection that we are invading the province of the legislature. Because I believe that the changes made by this Court are procedural and ameliorative, I feel that the changes mandated by the Court are well within constitutional parameters, and comport with the intent and purpose of the legislature in its enactment of the death penalty statute.

Id., at 666. The curative judicial construction the Alabama Supreme Court undertook in the Beck case in order to save the 1975 capital punishment statute was not unprecedented. The same court had previously engaged in curative judicial construction to save Alabama's obscenity statute, Pierce v. State, 292 Ala. 473, 475, 296 So. 2d 218 (1974), cert. denied, 419 U.S. 1130 (1975), and to save Alabama's statute for the legitimation of illegitimate children, Everage v. Gibson, 372 So. 2d 829, 832-834 (Ala. 1979).

To the extent that Appellant's separation of powers argument purports to have a federal constitutional basis, it fails outright, because "[t]he principle of separation of powers is not enforceable against the states as a matter of

federal constitutional law." E.g., Attwell v. Nichols, 608 F. 2d 228, 230 (5th Cir. 1979); see e.g., Rose v. Hodges, 423 U.S. 19, 22 (1975).

Both Jurek v. Texas, 428 U.S. 262 (1976), and Proffitt v. Florida, 428 U.S. 242 (1976), establish the federal constitutional propriety of state judicial action to conform capital punishment statutes to constitutional requirements. As the opinion in Lockett v. Ohio, 438 U.S. 586, 606-607 (1978), noted, the crucial difference between the Ohio statute which was struck down in that case and the statutes which had been upheld in Proffitt and Jurek was that the Florida and Texas courts had construed the statutes of those states to conform to the constitutional requirement that all relevant mitigating circumstances be considered. In addition, appellate review of sentencing, which was essential to the constitutionality of the Florida statute, see, Gardner v. Florida, 430 U.S. 349, 361 (1977), was read into that statute by the Florida Supreme Court. Proffitt v. Florida, 428 U.S. at 250-251.

Two recent federal appeals court decisions also strongly support the federal constitutional propriety of the Alabama Supreme Court's decision in Beck v. State, supra. In Knapp v. Cardwell, 667 F. 2d 1253 (9th Cir.), cert. denied, 51 U.S.L.W. 3420 (Nov. 30, 1982), a group of Arizona death row prisoners filed a class action lawsuit challenging the propriety of the Arizona Supreme Court's decision in State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), cert. denied, 440 U.S. 924 (1979). In Watson the Arizona Supreme Court had reacted to Lockett v. Ohio, 438 U.S. 586 (1978), by severing some offending language from the Arizona capital punishment statute and then judicially construing the statute to meet the newly enunciated constitutional standards.

The inmate plaintiffs in Knapp v. Cardwell, supra, charged that the Arizona Supreme Court's curative judicial

construction violated the Eighth and Fourteenth Amendments, the Double Jeopardy Clause, the Ex Post Facto Clause, and the Article IV, Section 4 guarantee of a republican form of government. The Ninth Circuit rejected all those claims and held, in essence, that a state court's interpretation of a state statute does not implicate the Federal Constitution and is in effect, none of a federal court's business. 667 F.2d at 1260.

The other recent federal appeals court decision on the issue is Jordan v. Watkins, 681 F. 2d 1067 (5th Cir. 1982), which involved the Mississippi Supreme Court's decision in Jackson v. State, 337 So. 2d 1242 (Miss. 1976). In Jackson the Mississippi Supreme Court rewrote that state's capital punishment statute to conform with the 1976 Supreme Court decisions prohibiting mandatory death penalties. Jordan v. Watkins, 681 F.2d at 1077-1078. The Fifth Circuit in Jordan upheld Mississippi's Jackson decision against federal constitutional attack. Jordan v. Watkins, 681 F.2d at 1079-1080. Since the Mississippi Supreme Court's curative judicial construction in Jackson was far more extensive than the Alabama Supreme Court's action in Beck v. State, supra, the Jordan decision is strong authority for the constitutional propriety of the Beck decision.

Finally, this Court itself has repeatedly held that the interpretation of state statutory provisions and the question about what happens to the remainder of a state statute when part of it is declared unconstitutional are state law questions to be decided by the highest court of the state. E.g., Ward v. Illinois, 431 U.S. 767, 772 (1972); Morey v. Doud, 354 U.S. 457, 470 n. 16 (1957). See, Smith v. Phillips, 102 S. Ct. 940, 948 ("Federal courts have no supervisory authority over state judicial proceedings..."). The Alabama Supreme Court has decided those state law

questions and this Court should not interfere with its decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Edward E. Carnes, a member of the Bar of the Supreme Court of the United States, do hereby certify that I did serve a copy of this brief on petitioner by placing a copy in the United States mail, postage prepaid, and properly addressed to his counsel of record as follows:

Hon. J. L. Chestnut, Jr.
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Selma, Alabama 36701

I further certify that I have served all parties required to be served.

Done this 19th day of May, 1983.

Ed Carnes

EDWARD E. CARNES
ALABAMA ASSISTANT ATTORNEY GENERAL